

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN ARMSTRONG, et al., on behalf
of themselves and as
representatives of the class,

NO. C 94-2307 CW

Plaintiffs,

ORDER GRANTING
MOTION FOR A
FURTHER
ENFORCEMENT ORDER
AND DENYING
MOTION TO HOLD
DEFENDANTS IN
CONTEMPT OF COURT
(Docket No. 2236)

EDMUND G. BROWN, JR., Governor of the State of California; CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION; MICHAEL MINOR, Director of the Division of Juvenile Justice; DR. JEFFREY A. BEARD, Secretary of the California Department of Corrections and Rehabilitation; JENNIFER SHAFFER, the Executive Officer of the Board of Parole Hearings; DIANA TOCHE, Acting Director of the Division of Correctional Health Care Services; CHRIS MEYER, Director of the Division of Facility Planning, Construction and Management; KATHLEEN DICKINSON, Director of Adult Institutions; and DAN STONE, Director of Division of Adult Parole Operations.

Defendants.

Plaintiffs move to enforce, and hold Defendants in contempt for violating, the Court's prior orders, on the basis that Defendants have consistently failed to provide sign language interpreters (SLIs) during education and vocational programs at the Substance Abuse Treatment Facility (SATF) and for failing to provide SLIs during psychiatric technicians' rounds for patients housed in administrative segregation housing units. Defendants

1 oppose Plaintiffs' motion. For the reasons set forth below, the
2 Court GRANTS the motion to enforce its prior orders and DENIES the
3 motion to hold Defendants in contempt.

4 BACKGROUND

5 In a series of orders between 1996 and 2002, the Court found
6 that Defendants' treatment of prisoners with disabilities violated
7 the American with Disabilities Act (ADA) and section 504 of the
8 Rehabilitation Act.

9 On January 3, 2001, Defendants issued the amended Armstrong
10 Remedial Plan (ARP) setting forth their own policies and plans to
11 come into compliance with their obligations under these federal
12 laws. See Kendrick Decl. ¶ 2, Ex. 1 (ARP).

13 Among other things, the ARP addressed effective communication
14 for deaf inmates. It recognized, "Because of the critical
15 importance of communication involving due process or health care,
16 the standard for equally effective communication is higher when
17 these interests are involved." Kendrick Decl. ¶ 2, Ex. 1, 4,
18 § II.E.2. The ARP mandates that an "inmate's ability to lip read
19 shall not be the sole source used by staff as a means of effective
20 communication involving due process or medical consultations,
21 unless the inmate has no other means of communication." Id. at 6,
22 § II.E.2.f. The ARP also provides, "Qualified sign language
23 interpreters . . . will be provided for all due process functions
24 and medical consultations that fall within the scope of those
25 described below when sign language is the inmate's primary or only
26 means of effective communication, unless the inmate waives the
27 assistance of an interpreter, reasonable attempts to obtain one
28 are not successful, and/or delay would pose a safety or security

1 risk." Id. at 5, § II.E.2.d. In the event that "a qualified sign
2 language interpreter is not available, or is waived by the inmate,
3 and communication is attempted," staff are required to "employ the
4 most effective form of communication available, using written
5 notes; staff interpreters who are able to interpret effectively,
6 accurately and impartially, both receptively and expressively,
7 using any necessary specialized vocabulary; or any other
8 appropriate means." Id. at 5-6. Covered medical consultations
9 included, for example, those pertaining to "[e]xplanation of
10 procedures, tests, treatment, treatment options, or surgery," and
11 "mental health evaluations, group and individual therapy,
12 counseling and other therapeutic activities." Id. at 6. The list
13 of medical consultations is "neither exhaustive nor mandatory, and
14 shall not imply that there are no other circumstances when it may
15 be appropriate to provide interpreters for effective communication
16 nor that an interpreter must always be provided in these
17 circumstances." Id. The ARP also requires equal access for deaf
18 prisoners, providing, "Accommodations shall be made to afford
19 equal access to the court, to legal representation, and to health
20 care services, for inmates/parolees with disabilities; e.g.,
21 vision, speech, hearing, and learning disabled." Id. at 7,
22 § II.G.¹

23

24

25 ¹ The ARP designates as DPH "Inmates/parolees who are
26 permanently deaf or who have a permanent hearing impairment so
27 severe that they must rely on written communication, lip reading,
enable them either to communicate effectively or hear an emergency
warning." Kendrick Decl. ¶ 2, Ex. 1, 3, § II.C.2. The Court uses
28 the term DPH and deaf interchangeably herein.

1 The federal ADA regulations define "qualified interpreter" as
2 "an interpreter who . . . is able to interpret effectively,
3 accurately, and impartially, both receptively and expressively,
4 using any necessary specialized vocabulary." 28 C.F.R. § 35.104.
5 The ARP defines "qualified sign language interpreter" to include
6 "a person adept at American Sign Language." Kendrick Decl. ¶ 2,
7 Ex. 1, 6, § II.E.3. Under the ARP, to "qualify as an ASL
8 interpreter, an individual must pass a test and qualify in one of
9 the five categories established by the National Association for
10 the Deaf (NAD), one of the three categories established by the
11 Registry of Interpreters for the Deaf (RID), or as a Support
12 Services Assistant Interpreter from the California Department of
13 Rehabilitation." Id. at 6-7.² Under the ARP, each institution is
14 required "to establish a contract or service agreement with a
15 local signing interpreter service organization in order to provide
16 interpretive services for hearing impaired inmates during due
17 process functions and medical consultations." Id.

18 The ARP further states, "It is the policy of CDC to ensure
19 that all inmates, regardless of any type of disability,
20 participate in educational/vocational, and work programs." Id. at
21 29, § IV.I.14.a. Thus, it provided, "Reasonable
22 modifications/accommodations shall be provided to ensure access
23 when appropriate for qualified inmates with disabilities to
24 participate in all programs, services, or activities including
25 vocational assignments," and "Reasonable

27

28 ² Plaintiffs state that NAD and RID merged their tests into a
single examination called the NIC after the issuance of the ARP.
Pls.' Reply at 5 n.6.

1 modifications/accommodations shall be provided to ensure access to
2 academic programs." Id. at 30, § IV.I.16-17; see also id. at 7,
3 § II.F ("The Department shall provide reasonable accommodations or
4 modifications for known physical or mental disabilities of
5 qualified inmates/parolees."). "Examples of reasonable
6 accommodations include special equipment (such as readers, sound
7 amplification devices, or Braille materials), inmate or staff
8 assistance, [and] bilingual or qualified sign language
9 interpreters." Id. at 7, § II.F.

10 On January 18, 2007, the Court found that Defendants had not
11 met their obligations to comply with federal law and the Court's
12 orders and continued to violate the rights of prisoners with
13 disabilities in four significant areas. Docket No. 1045, 2. As
14 relevant here, the Court found,

15 Contrary to law and the Armstrong Remedial Plan,
16 defendants consistently and systemically deny sign
language interpreters to deaf prisoners. Within
17 designated prisons, the violations occur most frequently
at deaf [prisoners'] medical and mental health
appointments. Plaintiffs have also presented pervasive
18 evidence of violations with regard to suicidal
prisoners; in education, work, and other programming;
and during classification hearings, harming deaf signers
19 by forcing them to rely on ineffective and inadequate
forms of communication such as lip reading and written
notes. As such, deaf signers are unable to understand
20 or comprehend significant due process proceedings and
medical care provided to them.

21 Id. at 3. The Court ordered Defendants to "establish as permanent
22 civil service positions qualified sign language interpreters for
23 each prison designated to house prisoners whose hearing
24 disabilities impact their placement (DPH)" and to "employ, through
25 whatever salary is necessary, sufficient qualified interpreters to
26 serve the needs of the DPH prisoners housed at each institution."

1 Id. at 8. The Court also required Defendants to comply with the
2 policies and procedures contained in the ARP related to these
3 issues, specifically including those regarding effective
4 communication for deaf prisoners contained in Section II.E. Id.
5 at 9.

6 On October 20, 2009, the Court found that "Plaintiffs have
7 demonstrated that Defendants have violated the rights of prisoners
8 with disabilities under the ADA and Section 504 by . . . denying
9 sign language interpreters to prisoners who need them in
10 educational and substance abuse programs." Docket No. 1661, 2.
11 The Court found specifically that "Defendants continue to deny
12 deaf inmates access to adequate sign language interpretation in
13 educational programs" and that "sign language interpretation may
14 not be adequate in Defendants' substance abuse programs." Docket
15 No. 1700, 5. The Court noted, for example, that in one instance,
16 when an inmate complained that "her inmate interpreter cannot keep
17 up with the course instructor," in response, "Defendants provided
18 her with written notes and lip reading," which the Court already
19 found to be inadequate in the 2007 order. Id.

20 To remedy these violations, the Court ordered Defendants to
21 "develop a Plan that includes funding, staffing, training,
22 resources and an implementation schedule." Docket No. 1661, 2.
23 The Court directed Defendants to file the plan within sixty days
24 and ordered that the plan "must provide for rapid implementation
25 and funding," with "no implementation date in the Plan . . . later
26 than August 14, 2010." Id. at 2-3. The Court required that
27 Defendants include a "plan to provide sufficient certified sign
28 language interpreters at, or remove deaf inmates from, prisons

1 that do not have interpreters in education and substance abuse
2 programs," or "alternatively, a plan for providing sign language
3 interpretation through the Receiver's videoconferencing capacity
4 including explanation of how any problems or delays in
5 implementing such plan will be resolved." Id. at 4.³ The Court
6 also ordered that "CDCR staff shall comply with the policies and
7 procedures contained in their Armstrong Remedial Plan relevant to
8 the issues outlined above," specifically including all of the
9 provisions quoted above, such as Sections II.E, II.F, IV.I.14,
10 IV.I.16 and IV.I.17. Id. at 4-5.

11 On December 21, 2009, Defendants filed their plan to comply
12 with the October 20, 2009 order. Docket No. 1686.

13 On January 11, 2010, Plaintiffs filed their objections to
14 this plan. Docket No. 1690.

15 On February 3, 2010, the Court noted that it "has not ordered
16 Defendants to implement their plan" to comply with the October 20,
17 2009 order "or any other," and that "Plaintiffs indicate that they
18 intend to move for implementation of Defendants' plan, with
19 modifications." Docket No. 1700, 6. The Court stated that it
20 would entertain Plaintiffs' motion. Id.

21 No such motion was filed. In subsequent joint case status
22 statements, the parties represented that Defendants modified their
23 plan after Plaintiffs filed their objections, provided Plaintiffs
24

25
26 ³ In the 2009 order, the Court did not intend the word
27 "certified" to carry a different meaning than the word "qualified"
28 that was used in the ARP and the 2007 order. Accordingly, as
discussed at the hearing without opposition from the parties, the
Court substitutes the word "qualified" for "certified" in the 2009
order.

1 with their updated plan on May 3, 2010 and began providing
2 in-person sign language interpretation in educational and
3 substance abuse programs in August 2010. See Docket No. 1706,
4 9-10; Docket No. 1720, 9-12; Docket No. 1729, 8; Docket No. 1799,
5 8. The parties also indicated that Plaintiffs were monitoring
6 Defendants' compliance with the modified plan.

LEGAL STANDARD

8 A district court has the authority to make an enforcement
9 order to secure compliance with its earlier orders and governing
10 law. See, e.g., March 21, 2006 Permanent Injunction, Docket No.
11 694, 4-5; Sept. 20, 1996 Remedial Order, Docket 158, 5.

12 A district court also has the inherent authority to enforce
13 compliance with its orders through a civil contempt proceeding.
14 International Union, UMWA v. Bagwell, 512 U.S. 821, 827-28 (1994).
15 A contempt sanction is considered civil if it "is remedial, and
16 for the benefit of the complainant." Id. A contempt fine is
17 considered civil and remedial if it either "coerce[s] the
18 defendant into compliance with the court's order, [or] . . .
19 compensate[s] the complainant for losses sustained." United
20 States v. United Mine Workers, 330 U.S. 258, 303-304 (1947).

21 "The standard for finding a party in civil contempt is well
22 settled: The moving party has the burden of showing by clear and
23 convincing evidence that the [non-moving party] violated a
24 specific and definite order of the court." FTC v. Affordable
25 Media, LLC, 179 F.3d 1228, 1239 (9th Cir. 1999) (quoting Stone v.
26 City & Cnty. of San Francisco, 968 F.2d 850, 856 n.9 (9th Cir.
27 1992)). The contempt "need not be willful, and there is no good
28 faith exception to the requirement of obedience to a court order."

1 In re Dual-Deck Video Cassette Recorder Antitrust Litig., 10 F.3d
2 693, 695 (9th Cir. 1993). "But a person should not be held in
3 contempt if his action appears to be based on a good faith and
4 reasonable interpretation of the court's order." Id. (internal
5 formatting and quotation marks omitted). "'Substantial
6 compliance' with the court order is a defense to civil contempt,
7 and is not vitiated by 'a few technical violations' where every
8 reasonable effort has been made to comply." Id. (citing Vertex
9 Distrib., Inc. v. Falcon Foam Plastics, Inc., 689 F.2d 885, 891
10 (9th Cir. 1982)).

11 Thus, the Court may grant a motion for an order of contempt
12 if it finds that Defendants (1) violated a court order, (2) beyond
13 substantial compliance, (3) not based on a good faith and
14 reasonable interpretation of the order, (4) by clear and
15 convincing evidence. Id. Once the moving party has met its
16 burden, the burden "shifts to the contemnors to demonstrate why
17 they were unable to comply" with the court order. Stone, 968 F.2d
18 at 856 n.9 (citing Donovan v. Mazzola, 716 F.2d 1226, 1240 (9th
19 Cir. 1983)). "They must show they took every reasonable step to
20 comply." Id. (citing Sekaquaptewa v. MacDonald, 544 F.2d 396, 406
21 (9th Cir. 1976)).

22 Civil sanctions are appropriate, at the court's discretion,
23 to encourage Defendants to comply with its order. United States
24 v. United Mine Workers, 330 U.S. 258, 303-04 (1947). In deciding
25 whether to impose a civil contempt sanction, the Court should
26 consider: the harm from non-compliance; the probable effectiveness
27 of the sanction; the contemnor's financial resources; and the
28 burden the sanctions may impose. Id. at 303-304.

1 DISCUSSION
2

3 As noted, Plaintiffs move for an enforcement order and to
4 hold Defendants in contempt for setting a policy that SLIs would
5 not be provided during psychiatric technicians' rounds for
6 patients housed in administrative segregation housing units, and
7 for consistently failing to provide qualified SLIs during
8 educations programs at SATF, a facility that houses a large number
9 of deaf inmates.

10 I. Mental health encounters in segregated housing units
11

12 Plaintiffs contend that Defendants are violating the ARP by
13 failing to provide an SLI for hearing-impaired inmates during the
14 rounds that psychiatric technicians conduct for prisoners housed
15 in the segregation units. As quoted above, and acknowledged by
16 both parties, the ARP provides that, when sign language is the
17 inmate's primary or only means of effective communication,
18 qualified sign language interpreters must be provided for medical
19 consultations that fall within the scope of a list of examples,
activities.

20 On January 3, 2013, Defendants promulgated a new policy
21 detailing sign-language interpretation requirements for medical
22 and mental health encounters. Kendrick Decl., Ex. 31; Eargle
23 Decl. ¶ 4, Ex. A; see also Defs.' Opp. at 6. This policy provides
24 in relevant part,

25 Licensed Psychiatric Technician (PT) rounds are required
26 for all inmates housed in an Administrative Segregation
27 Unit (ASU) and Security Housing Units (SHU). These
28 rounds are conducted in ASU's daily seven days a week
and weekly for Mental Health Services Delivery System
(MHSDS) inmates or biweekly for non-MHSDS inmates in
SHU's. The interaction between an inmate and the PT on

1 these rounds does not typically require gathering or the
2 exchange of medical information or making a mental
3 health evaluation or assessment. Instead, the PT
4 observes the inmate and notes what he/she sees. If the
5 inmate indicates a problem by using "hand gestures" (see
6 below) or other means of communication, or if a psych
7 tech has a concern as a result of his/her observation,
8 the PT should contact the physician or other clinician
9 on duty for a clinical evaluation/assessment with the
10 assistance of the SLI on duty (or a contractor if need
11 be). In such a situation staff shall maintain one-on-
12 one observation of the inmate until appropriate clinical
13 intervention is obtained. Although the Coleman MHSDS
14 Program Guide notes that the PT is to attend to the
15 mental health needs of the inmates in ASU, that does not
16 mean that every encounter between a PT and an inmate is
17 an evaluation covered by the Armstrong Remedial Plan
18 (ARP) or that observations of the inmate on rounds are
19 equivalent to evaluation.

20 CDCR realizes that mental health clinician encounters
21 require effective communication. Initial placement in
22 ASU can occur on any day of the week, at any time of the
23 day. At the pre-placement screen an SLI will be
24 provided. At that time the PT and the I/P (with the
25 assistance of the SLI) will establish additional hand
26 signals to indicate levels of stress (low, medium, and
27 high) for the inmate to use during PT rounds at which an
28 SLI is not present or available. . . .

29 Eargle Decl. ¶ 4, Ex. A.

30 Dr. Amy Eargle, the Chief Psychologist of the Headquarters
31 Clinical Support Unit for CDCR's Mental Health Program, states
32 that no SLI assistance is needed during the psychiatric
33 technicians' rounds, because they "observe inmates' appearance and
34 behavior and note their observations," and "the exchange of
35 important medical information takes place" instead during the
36 "first interaction with the Primary care Provider . . . , which
37 happens at the initial placement meeting for ASI or SHU Housing
38 where an SLI is present. Eargle Decl. ¶ 6. Dr. Timothy Belavich,
39 the Acting Director of the Division of Health Care Services of
40 CDCR, states that the "daily or weekly rounds are brief,
41 unstructured, interpersonal interactions, typically occurring at
42

1 cell front," which "are conducted to ensure an inmate-patient's
2 general well-being and/or determine the potential need for
3 services." Belavich Decl. ¶ 8. He states that the interaction
4 "during rounds does not require the [licensed psychiatric
5 technician (LPT)] to gather or exchange medical information." Id.
6 "Rather, during rounds, the LPT observes the inmate-patient and
7 notes what he or she sees." Id.

8 As acknowledged in the January 2013 policy, CDCR's MHSDS
9 Program Guide states that these rounds are to be conducted daily
10 in administrative segregation units and weekly or bi-weekly in
11 security housing units "to attend to the mental health needs" of
12 inmates. Pls.' Request for Judicial Notice (RJN), Ex. 1, 12-8-7.⁴
13 It provides that the interactions in these clinical rounds "shall
14 be sufficient to ascertain the inmate's mental condition
15 particularly during the first ten days" that they are in
16 administrative segregation. Id. at 12-7-5. During the rounds,
17 the psychiatric technician is expected to identify "inmates who
18 have not been previously identified as having mental health
19 treatment needs but exhibit possible signs and symptoms of a
20 serious mental disorder" and refer to them for a clinical
21 evaluation, and to document any "unusual findings that may require
22 closer observation." Id. at 12-8-7. The psychiatric technicians
23 apparently expect to talk to the inmates; the Program Guide
24
25

26
27 ⁴ Plaintiffs request, and Defendants do not oppose, that the
Court take judicial notice of excerpts of Defendants' MHSDS
28 Program Guide, which was filed in Coleman v. Brown, Case No.
90-520.

1 states, "If an inmate refuses to talk to the LPTs, the LPT will
2 discuss the inmate's functioning with custody staff." Id.

3 Defendants argue that the psychiatric technician rounds are
4 not clinical assessments or evaluations and thus that there is no
5 Court order that they have violated by failing to provide a sign
6 language interpreter at these interactions. However, the
7 descriptions of these interactions provided by Defendants'
8 witnesses and their own materials show that these are interactions
9 in which the inmates' mental health status is evaluated or
10 assessed in some manner. Thus, under the ARP, with which this
11 Court has ordered Defendants to comply, they are required to
12 provide a qualified sign language interpreter at these encounters.

13 Defendants argue that they have complied with the Court's
14 orders, the ARP and the ADA because it is sufficient to meet the
15 needs of these prisoners to provide qualified sign language
16 interpreters during other mental health encounters or to use the
17 predetermined hand signals to communicate. They state that,
18 according to their policy, if the psychiatric technician has any
19 concerns about the inmate based on his or her observations during
20 rounds, he or she is required to contact a clinician to conduct an
21 assessment, which would be conducted with the assistance of an
22 SLI. However, these rounds may be the only mental health
23 encounters for some or all of the deaf inmates in administrative
24 segregation and they occur much more frequently than other such
25 encounters. The Court also has previously found that Defendants
26 harm deaf prisoners by forcing them to rely on inadequate and
27 ineffective forms of communication, such as reading lips and
28 written notes. Docket No. 1045, 3. The limited hand signals that

1 Defendants use here--in essence, thumbs up or thumbs down--are not
2 adequate "to ascertain the inmate's mental condition" as the
3 technicians are supposed to do here. If the technician and a deaf
4 inmate cannot communicate effectively during rounds, the
5 technician does not have a comparable opportunity to evaluate a
6 deaf inmate for concerns that would lead him or her to contact a
7 clinician for a full assessment, as for an inmate without a
8 disability. The declarations submitted by class members further
9 demonstrate that they felt that they could not communicate their
10 feelings adequately with the technicians. See, e.g., Kendrick
11 Reply Dec., Ex. 4.⁵

12

13 ⁵ Defendants object to portions of Plaintiffs' reply and
14 supplemental evidence on the basis that it is untimely and should
15 have been submitted with their moving papers. Defendants move to
16 file evidence regarding additional SLI positions created at SATF,
17 which took place after they filed their opposition brief. In the
18 interest of considering a full evidentiary record, the Court
19 GRANTS Defendants' motion to submit additional evidence, OVERRULES
Defendants' objections to Plaintiffs' reply and supplemental
evidence and DENIES Defendants' motion to strike. Both sides had
an opportunity to address the additional evidence at the hearing
on this motion. Further, the evidence submitted by Plaintiffs
with their reply properly responds to issues raised by Defendants
in their opposition.

20 Defendants also object that the inmate declarations submitted
21 with Plaintiffs' reply brief are inadmissible because they were
22 written with the assistance of sign language interpreters, who did
23 not submit declarations addressing their qualifications and the
accuracy of their translations. Even if authentication by the
interpreters who assisted the inmates with the preparation of
these declarations were required, Plaintiffs have since provided
such declarations, see Docket Nos. 2284-6, and Defendants have not
argued that they suffered any prejudice as a result of the
interpreter declarations being filed subsequently. To the extent
that Defendants argue that the inmate declarations are hearsay,
this is unavailing. The inmates themselves signed the
declarations and attested to the truthfulness of their contents
under penalty of perjury, regardless of who prepared the documents
themselves.

28

1 Plaintiffs have offered clear and convincing evidence that
2 Defendants have adopted a policy not to provide these interpreters
3 and have not substantially complied with the Court's orders. To
4 ensure compliance with the Court's past orders, the Court issues
5 an enforcement order requiring Defendants, for all deaf prisoners
6 whose primary means of communication is sign language, to provide
7 a qualified sign language interpreter during all regularly-
8 scheduled mental health rounds and all other encounters within the
9 definition of the ARP. Because there appears to have been a good
10 faith misunderstanding about whether these mental health
11 encounters fell within the terms of the ARP and the Court's prior
12 orders, which have now been clarified in this order, the Court
13 declines to impose sanctions at this time.

14 Defendants do not argue that they were unable to comply with
15 the Court's orders or that it would be impossible to do so in the
16 future. Instead, they argue that Plaintiffs' requested monetary
17 sanctions--"\$1,000 for each failure to provide an interpreter for
18 mental health professionals' rounds when deaf prisoners are housed
19 in segregated housing units," Pls.' Proposed Order, Docket No.
20 2240, 5--are not warranted because Plaintiffs have not shown that
21 any inmates have been harmed or that the policy to use
22 pre-arranged hand signals does not work to evaluate the mental
23 health of a deaf inmate.

24 Although monetary sanctions will not be imposed at this time,
25 the Court notes that Plaintiffs have shown that Defendants' lack
26 of compliance on this issue has created a substantial and
27 unnecessary risk to class members. Plaintiffs have offered
28 substantial evidence that inmates who are in administrative

1 segregation are at a substantially increased risk of having mental
2 health needs, self-harm and suicide. Thirty-four percent of all
3 suicides in CDCR were in segregated housing. The Coleman Special
4 Master found that "the likelihood of a CDCR inmate committing
5 suicide in segregated housing units in CDCR prisons is 33.09 times
6 greater than it is in non-segregated housing units, based on total
7 suicides in 2011." Stewart Reply Decl. ¶ 25, Ex. C, 16-17;⁶ see
8 also RJN, Ex. 2 (Coleman Special Master's report showing that
9 thirty-four percent of the inmates who committed suicide in 2010
10 were housed in ASU at the time of their deaths). Defendants
11 object that these statistics are irrelevant because they are not
12 specific to deaf prisoners in segregated housing units. However,
13 these statistics include those prisoners; they show an increased
14 risk to all inmates in segregated housing units, not only to those
15 who are not deaf.⁷ Plaintiffs also have offered declarations from
16 deaf prisoners who have been in administrative segregation, who
17 felt depressed and who wanted or attempted to hurt themselves.
18 Kendrick Reply Decl., Exs. 4, 5. They said that they wanted to
19

20 ⁶ Defendants object to Dr. Stewart's declaration as improper
21 expert witness testimony because "he is not qualified as an expert
22 on effective communication with hearing-impaired individuals."
23 Docket No. 2279, 1. However, he has shown that he is an expert on
24 mental health treatment and suicide prevention in prisons,
including in segregated housing units. See, e.g., Stewart Reply
Decl. ¶¶ 1-14. Thus, he is qualified to testify on the standards
of mental health practices in such settings, which is the subject
on which he opines.

25 ⁷ Plaintiffs request that the Court take judicial notice of
26 the Special Master's first report, which was filed in the Coleman
27 case. Defendants object on the basis that the subject matter of
28 the report is not limited to hearing-impaired prisoners. Because
the Court has overruled Defendants' only basis for objection, the
Court grants Plaintiffs' request for judicial notice of the
report.

1 tell the mental health staff about their feelings but could not
2 communicate with them. Id. To the extent that Defendants argue
3 that deaf prisoners were not harmed because none have actually
4 succeeded at committing suicide since this policy was implemented,
5 the Court need not wait until a death to require compliance with
6 its orders. The Court already found in the 2007 order that
7 Defendants had consistently and systematically denied sign
8 language interpreters to deaf prisoners, including to suicidal
9 prisoners, causing them significant harm. Docket No. 1045, 2-3.

10 Accordingly, the Court GRANTS Plaintiffs' motion for an
11 enforcement order and directs Defendants to provide qualified sign
12 language interpreters during psychiatric technician rounds, and
13 DENIES the motion for contempt.

14 II. Education and vocational programs at SATF

15 As of March 22, 2013, there were forty-one deaf inmates at
16 SATF who require SLIs. Ramirez Decl. ¶ 5. Of these, twelve are
17 currently enrolled in vocational or educational classes. Id. at
18 ¶ 6. At the time that this motion was briefed, SATF employed one
19 full-time SLI, who provided interpretation services primarily for
20 due process encounters. For SLI services for vocational or
21 educational classes, SATF utilized three companies under contracts
22 with CDCR. Id. at 7.

23 Plaintiffs contend that Defendants have consistently failed
24 to provide SLIs at many educational and vocational classes
25 attended by deaf prisoners at SATF. In support of this
26 contention, they offer evidence of the SLI logs that were prepared
27 by the SLI scheduler at SATF. See Kendrick Decl. ¶¶ 5-13, 15,

1 Exs. 2-10, 12; Kendrick Reply Decl. ¶¶ 4-5, Ex. 1;⁸ see also
 2 Sweeny Decl. ¶¶ 6-7, 11-17 & Exs. B, C. Defendants acknowledge
 3 that these logs "reflect every session of a course where a DPH
 4 inmate is enrolled" and "whether or not a certified SLI was
 5 present for a class." Sweeny Decl. ¶¶ 6-9, 11-17; see also Opp.
 6 at 11. There is no dispute that the logs show that an SLI was not
 7 present at more than a quarter of the classes in which a deaf
 8 inmate was enrolled between August 14, 2010 and February 15,
 9 2013.⁹ Further, there is no dispute that, between November 1,
 10 2012 and February 15, 2013, the time period covered by the most
 11
 12
 13

14 ⁸ Defendants object to the statement in the Kendrick
 15 declarations that SLIs were "needed" but not provided in various
 16 class sessions but do not appear to object to the admissibility of
 17 the logs, which are attached as exhibits to these declarations and
 18 which Defendants have independently offered as evidence and
 19 authenticated. The Court overrules their objection. The Court
 20 understands the statements in the Kendrick declaration to mean
 21 that these were class sessions in which a DPH inmate was enrolled
 22 and no SLI was provided. To the extent that the parties dispute
 23 whether the SLIs were "needed" or not in these instances, the
 24 Court addresses the substance of their dispute later in this
 25 order.

26 ⁹ Defendants submit the declaration of Aniah Sweeny, who
 27 prepared the SLI scheduling logs. Ms. Sweeny attests that, in
 28 addition to tracking education and vocational classes, the logs
 also track the "medical and due process encounters at SATF where
 an SLI was scheduled to attend." Sweeny Decl. ¶ 9. She states
 that, of the 5,805 total encounters tracked on the logs between
 August 14, 2010 and February 15, 2013, "SLIs were not present for
 553 of the encounters (or 9.5%)." Id. She also states that 4,055
 of these encounters "were medical, mental health, dental or due
 process (disciplinary) appointments," and of these 4,055
 encounters, "an SLI was not present for 57 of the encounters
 (1.4%)." Id. at ¶ 10. Subtracting the latter numbers from the
 total numbers reveals that, of the remaining approximately 1,750
 encounters, which were the educational and vocational classes, an
 SLI was not present in about 496 instances, or about 28% of the
 time. Cf. Pls.' Reply, 4 & n.5 (calculating "a 28% error rate"
 for this time period).

1 recent log produced by Defendants,¹⁰ the entries show that there
2 was no SLI present for at least twenty-five percent of the classes
3 that included deaf inmates.¹¹

4 Plaintiffs also submit evidence that deaf prisoners at SATF
5 have filed grievances about the lack of SLIs in their educational
6 and vocational classes. See Kendrick Decl. ¶¶ 17-18, Exs. 14 &
7 15. In one of these, dated June 20, 2012, a deaf prisoner wrote
8 that he had not had an interpreter for over a month in his class
9 and that this was disruptive to him. Id. at ¶ 17, Ex. 14. In
10 response, the warden admitted that

11 the State has a contract with three companies that
12 provide Sign Language Interpreters (SLI). The SLI are
13 freelance and the institution has no control over when
14 they choose to work. It is noted there are not enough
SLIs for one to be assigned to all classes within the
Education and Vocational classes. Moreover, the
institution does not have back up interpreters.

15 Id. The warden stated that, although teachers inform the SLIs
16 when they "are scheduled to lecture, . . . the SLIs are not
17 available." Id. In another grievance, an inmate requested an SLI
18 in his electronics vocational course. Id. at ¶ 18, Ex. 15. In
19

20 ¹⁰ Defendants argue that Plaintiffs did not provide with their
21 moving papers any logs covering a period more recent than October
22 2012. However, Defendants did not turn over the more recent logs
from November 2012 through February 2013 until March 7, 2013, a
23 week after Plaintiffs filed their motion on February 28, 2013.
See Kendrick Reply Decl. ¶ 4; Docket No. 2236. In addition,
24 Defendants submitted the updated logs with their opposition brief
and Plaintiffs also offered them with their reply brief, to which
Defendants did not object.

25 ¹¹ Defendants' evidence indicates that the "log entries . . .
26 show a certified SLI was present for 74.4% of the classes during
this time period." Sweeny Decl. ¶ 7. Plaintiffs calculate from
27 the logs that there were ninety-one classes without an SLI, out of
a total of 334 classes during this time period, resulting in
28 twenty-seven percent of classes being without an SLI. Kendrick
Reply Decl. ¶ 5.

1 response, on September 25, 2012, the associate warden wrote,
2 "Continuous efforts have been made to provide SLI services;
3 however there are not enough SLI interpreters to facilitate the
4 need." Id. He added that the institution would "continue
5 diligent efforts to provide SLI services on a rotational basis
6 depending upon availability of the SLI's." Id.

7 Defendants further argue that the logs do not show those
8 instances where they use the services of an inmate sign language
9 aide (SLA) instead of a qualified SLI to interpret for a deaf
10 prisoner in a class. Id. at 11-12. Plaintiffs respond that
11 Defendants did not show how often these SLAs were in classes or
12 that these individuals were qualified as required by the Court's
13 order. The Court has previously found that Defendants were
14 continuing to deny deaf inmates access to adequate sign language
15 interpretation in education and vocational programs and that the
16 unqualified inmate interpreters were not sufficient for this
17 purpose. Docket No. 1700, 4-5; see also Docket No. 523, 11
18 (recognizing that "using unqualified interpreters may hinder
19 communication"). Defendants have not offered evidence that the
20 SLAs are qualified under the ARP or the ADA.¹² The Court notes
21 that, because of the failure to provide adequate interpretation,
22 it has already ordered Defendants to establish permanent civil
23

24 ¹² Defendants have provided evidence that the "inmate job
25 description" for SLAs includes as a requirement that the inmate be
26 "Able to communicate using American Sign Language" as "determined
27 by Mr. Shaewitz, the certified sign language interpreter on
28 permanent staff at SATF." Ramirez Decl. ¶¶ 9-10 & Ex. F, 3. No
evidence is provided to show, among other things, that the SLAs
are adept at American Sign Language, are able to interpret
effectively, accurately, and impartially, or have passed any of
the required tests or qualifications.

1 service positions for qualified sign language interpreters at each
2 prison designated to house prisoners with hearing disabilities.

3 Defendants also contend that their logs are insufficient to
4 show that they failed to comply with any requirement that they
5 provide qualified interpreters in that the logs do not track
6 instances where the class did not require an interpreter "because
7 the lesson plan did not require verbal communication for that
8 session," where the deaf student refused the SLI's services, where
9 a class was cancelled or where the deaf student was absent from
10 the class in which he was enrolled. Defs.' Opp. at 11. However,
11 the logs do identify at least some instances in which the deaf
12 prisoner was absent, the class was cancelled or the deaf prisoner
13 refused the services of an SLI. See, e.g., Aniah Decl., Ex. B, 48
14 (indicating "Inmate Refused"); Aniah Decl., Ex. C, 24 (indicating
15 "CLASS CANCELLED"); Aniah Decl., Ex. C, 37 (indicating "INMATE NOT
16 IN CLASS"). Defendants have not offered evidence of how many
17 classes listed on their logs had lesson plans that did not require
18 verbal communication. Defendants, not Plaintiffs, control what
19 information is or is not logged and Defendants, but not
20 Plaintiffs, could have chosen to document these reasons. Because
21 Defendants failed to log consistently the information that might
22 show that an SLI was not required for a particular class meeting,
23 and in light of the written acknowledgments from the wardens about
24 the reasons that SLIs were not always provided as needed, the
25 Court declines to infer that Defendants' claimed vitiating
26 circumstances existed regularly. Thus, the Court finds that these
27 arguments do not undermine Plaintiffs' *prima facie* showing that
28 Defendants did not provide SLIs in many education and vocational

1 classes in which deaf inmates were enrolled.

2 Defendants also represent that they have made an effort to
3 schedule a qualified SLI at each class in which a deaf student was
4 enrolled since the middle of 2010 by utilizing contractors, but
5 that the contractors they use are sometimes unable to provide SLIs
6 and that the facility "cannot obtain SLI coverage through other
7 contractors because [it is] required to use the three state-
8 approved contractors." Sweeny Decl. ¶ 3; see also Ramirez Decl.
9 ¶ 6 (noting that the state was required to "accept the lowest-
10 priced proposal" when contracting for these services). However,
11 this excuse is unavailing. The Court previously required
12 Defendants to establish permanent civil service positions, at
13 whatever salary necessary, in order to provide adequate services
14 for these purposes. Defendants are required to have sufficient
15 SLIs on staff to provide the needed interpretation services.
16 Although there may be instances in which an SLI is unavailable,
17 for example, if a staff member is unexpectedly ill and no
18 substitute can be located, failing to provide an interpreter in
19 education and vocational classes twenty-five percent of the time,
20 without addressing the problem, for years before Plaintiffs filed
21 a motion for contempt, simply does not constitute making a
22 reasonable effort to comply with the Court's prior orders.

23 Defendants could have sought approval for additional civil
24 service positions or increased contractor services but failed to
25 do so, until after Plaintiffs brought this motion. Since that
26 time, Defendants obtained approval to increase the funding for
27 contract SLIs by the equivalent of one full-time position,
28 bringing its total contract SLIs from 2.5 to 3.5 full-time

1 equivalents. Sweeny Decl. ¶ 5. The increased contractor services
2 went into effect on April 8, 2013. Between April 8, 2013¹³ and
3 April 30, 2013, the SLIs did not attend eleven of the one hundred
4 scheduled classes; the logs indicate that the reasons for these
5 absences were that a contract "SLI called in sick" or there was
6 "no SLI available per contractor." Sweeny Suppl. Decl. ¶ 2, Ex.
7 A.¹⁴ After this motion was briefed, Defendants submitted evidence
8 that they have also obtained authorization to increase from one to
9 three the number of full-time qualified SLIs at SATF that they
10 employ directly in civil service positions. Defendants contend
11 that this increase will make them less reliant on contract SLI
12 services. Knowles Suppl. Decl. ¶ 8 & Exs. A-C. At the hearing,
13 Defendants also represented that they planned to begin
14 consistently logging additional information, including if a class
15 was cancelled or if a deaf inmate was absent from a class meeting.

16 Because of Defendants' extended failure to provide SLIs in
17 many education and vocational classes in violation of the Court's
18 prior orders, the Court GRANTS Plaintiffs' motion to enforce those
19 orders. Because Defendants have demonstrated that they are
20 presently making substantial efforts to reach compliance with the
21 Court's orders and the ADA requirements by voluntarily increasing
22 both the contract and civil services positions for qualified SLIs
23 at SATF, the Court finds that no civil contempt sanctions are
24

25 ¹³ It appears that there were no classes scheduled between
26 April 3 and 8. Sweeny Suppl. Decl. ¶ 2, Ex. A.

27 ¹⁴ The Court notes that the logs do not show whether
28 Defendants made efforts to find a substitute SLI when one called
in sick or whether none of the three contractors was able to
provide an SLI.

1 needed at the present time to coerce their compliance.
2 Accordingly, Plaintiffs' motion for contempt for their failure to
3 provide qualified SLIs at educational and vocational classes at
4 the facility is DENIED. This denial is without prejudice to
5 renewal if Defendants fail to provide proper services in the
6 future.

7 CONCLUSION

8 For the reasons set forth above, the Court GRANTS Plaintiffs'
9 motion to enforce and DENIES the motion to hold Defendants in
10 contempt (Docket No. 2236). This order also resolves Docket Nos.
11 2297 and 2304.

12 The Court hereby orders:

13 1) For all deaf prisoners whose primary means of
14 communication is sign language, Defendants shall provide a
15 qualified sign language interpreter during all regularly-scheduled
16 mental health rounds, as well as all other encounters within the
17 definition of the Armstrong Remedial Plan.

18 2) Defendants shall implement their plan regarding sign
19 language interpretation in educational and substance abuse
20 programs, provided to Plaintiffs on May 3, 2010. As required in
21 the Court's prior orders, Defendants shall establish permanent
22 civil service positions for qualified sign language interpreters
23 for SATF, for as long as it is designated to house DPH prisoners.
24 Defendants shall employ, through whatever salary is necessary,
25 sufficient qualified interpreters to serve the needs of the DPH
26 prisoners housed at SATF, including at all educational and
27 vocational classes in which a DPH inmate is enrolled, barring
28 unforeseen circumstances. Defendants may seek relief from this

1 provision at SATF if their video conferencing facilities become
2 sufficient to provide all necessary sign language services at that
3 institution.

4 3) Defendants shall continue to maintain logs on all
5 educational and vocational programs at SATF to document whether
6 deaf prisoners who rely upon sign language as their primary means
7 of communication were provided a qualified sign language
8 interpreter during the program and who the interpreter was. If a
9 qualified sign language interpreter was not provided, Defendants
10 shall document the reason therefor. Defendants must produce the
11 previous month's logs to counsel for Plaintiffs by the fifteenth
12 of each month.

13 The Court finds that the relief ordered herein is narrowly
14 drawn, extends no further than necessary to correct the violation
15 of federal rights, and is the least intrusive means necessary to
16 correct the violation of the federal rights.

17 IT IS SO ORDERED.

18
19 Dated: 6/4/2013


CLAUDIA WILKEN
United States District Judge

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